88-1152

Supreme Court, U.S.
FILED
DEC 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

INCOME PROPERTIES, INC., ET AL.,
PETITIONER

vs.

JOHN C. LUNSFORD, ET AL. -- RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTION PRESENTED

MAY THE SUPREME COURT OF GEORGIA (OR ANY COURT) DECIDE A FACTUAL ISSUE RAISED BY ONE PARTY'S MOTION WITHOUT GIVING THE OPPOSING PARTY AN OPPORTUNITY FOR A HEARING AND AN OPPORTUNITY TO PRESENT OPPOSING EVIDENCE.

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QUESTION PRESENTED

A. MAY THE SUPREME COURT OF GEORGIA (OR ANY COURT) DECIDE A FACTUAL ISSUE RAISED BY ONE PARTY'S MOTION WITHOUT GIVING THE OPPOSING PARTY AN OPPORTUNITY FOR A HEARING AND AN OPPORTUNITY TO PRESENT OPPOSING EVIDENCE? (i)

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioners, Income Properties, Inc., et al., respectfully pray that a Writ of Certiorari issue to review the judgment (renderd without opinion) of the Supreme Court of Georgia entered in this case on September 7, 1988, rehearing denied September 22, 1988.

I.

OPINION BELOW

The judgment entered by the Supreme Court of Georgia on September 7, 1988 and the judgment denying the Motion for Rehearing are set out as Exhibits A & B to this Application.

II.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

III.

CONSTITUTIONAL PROVISION INVOLVED

This Application is brought pursuant to the Fifth Amendment to the Constitution of the United States which provides (in relevant part):

"No person shall . . . be deprived of life, liberty, or property without due process of law . . . ".

IV.

STATEMENT OF FACTS

The case in the trial court involved the efforts of the Plaintiff (Respondent) to cut off and terminate the ownership and possessory rights of the Defendants (Applicants) to a certain commercial

building located in Atlanta, Georgia. The property had been developed by the Defendants and they had occupied a part of the premises ever since they had built it in the early 1950's.

The Plaintiff had foreclosed on this property in 1976. The Defendants continued to occupy this property even after this foreclosure pursuant to a written lease which had been executed many years previously. The Plaintiff brought this action in an effort to terminate the lease and all of the Defendants' rights under it.

A non-jury trial in the Fulton County Superior Court resulted in a judgment for the Plaintiffs. This judgment was entered on October 19, 1987.

Georgia law provides that an appeal is taken from a judgment by the filing of

a Notice of Appeal and further provides that such Notice of Appeal must be filed within thirty (30) days of the date of the judgment (O.C.G.A. § 5-6-37).

"Filing" under Georgia law means filing with the Clerk of the trial court (O.C.G.A. § 5-6-37). "Filing" under Georgia law also means handing a paper to the Clerk (or Deputy Clerk) of the Court. This may be accomplished at any place, even the home of the Clerk. In other words, a party has properly filed a paper with the Clerk when he hands the paper to the Clerk or to a Deputy Clerk. The place where this is accomplished is immaterial [Duke's v. Ralston Purina Co., 127 Ga. App. 696; New England Mortgage Co. v. Collins, 150 Ga. 104(2)].

The Fulton County (Atlanta) Georgia Courthouse and Clerk's office has

experienced the same growth problems that affect the operations of many governmental units, and the volume of business has required the Clerk's office to be divided between floors in the Courthouse. The regular, traditional, and normal filing desk continues to operate in the same first-floor location that it has always occupied. However, the filing desk for appellate pleadings (including Notices of Appeal) has been moved to a back office of the second floor of the Courthouse. The Clerk prefers that Notices of Appeal be filed on the second floor, but that is not a matter of law, printed rule, regulation, or ordinance of any kind. It is simply an informal request that the Clerk makes of litigants.

In this case, the Notice of Appeal was timely and properly prepared, timely and properly served on opposing counsel, and timely and legally filed with the Clerk. However, it was filed with the main filing desk on the first floor instead of on the second floor. Apparently, the Clerk's office re-routed the Notice of Appeal in its inter-office mail to the second floor filing desk, and by the time it was received and entered FILED by that second floor desk it was past the thirty (30) day period.

No mention of this fact was ever made by the Plaintiff (Respondent) in the trial court. Instead, Plaintiff waited until the case had been transferred to the Supreme Court and filed a Motion to Dismiss the Appeal.

The Defendants responded to the Motion to Dismiss by pointing out these same facts as recited above. The Applicants also requested an opportunity (either in the Supreme Court or in the trial court) to show what had transpired and that proper and timely filing had actually taken place.

When the Plaintiff filed his Motion to Dismiss, the appeal had been scheduled for oral argument pursuant to Rule 49 of the Supreme Court of Georgia.

The Supreme Court of Georgia, on its own motion, cancelled the oral argument and entered an order and judgment dismissing the appeal.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Due Process means the right to a meaningful hearing (Mathews v. Eldridge, 96 S. Ct. 893, 424 U.S. 319, 47 L. Ed 2 18). In this case, the Supreme Court of Georgia denied Applicants any opportunity to contest the written notation of the Clerk as to the date of filing. Furthermore, this matter was presented to the Supreme Court of Georgia as an original issue never having been raised in any court or in any hearing or proceeding previously. The Supreme Court of Georgia made a factual determination without affording any opportunity to contest the fact, to offer contrary evidence, or to be heard in any way in opposition. As a result, all of Applicants' property rights have been lost.

Had an administrative body or another branch of government acted in such a way, it would have been clearly violative of the most fundamental notions of due process. A state Supreme Court can no more violate the requirements of due process than can any public officer, body, or unit.

Any governmental official can abuse the power entrusted to him, and there are times when it becomes necessary to control an governmental official from the President on down. A state Supreme Court Justice can fail to give due process just as can a police officer, and both need to be controlled.

The procedures adopted by the Supreme Court of Georgia are absolutely deficient and are utilized by them repeatedly, not just in this case. The

Supreme Court of Georgia's actions should not be above scrutiny because it is a court.

A court must observe the requirements of due process before any other person or body can be expected to.

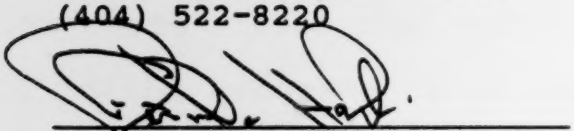
CONCLUSION

A court cannot adopt impermissible procedures just as any other unit of government cannot, and the same scrutiny and safeguards must be employed to prevent judicial deprivations of due process as apply to all others. Courts should set the example of observing the fundamental notions of fair play and while their standards should be higher than others, they surely cannot be lower.

Respectfully submitted,



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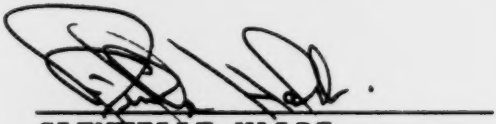
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CERTIFICATE OF SERVICE

This is to certify that I have this date served opposing counsel with a true and correct copy of the within and foregoing Petition for Writ of Certiorari by depositing same into the United States Mail with adequate postage thereon, and addressed as follows:

Mr. Tom Pye, Esquire
6485 Peachtree Industrial Blvd.
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This _____ day of December, 1988.



GLENVILLE HALDI
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SUPREME COURT OF GEORGIA

ATLANTA September 7, 1988

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

INCOME PROPERTIES, INC., ET AL. V. JOHN C. LUNSFORD, ET AL., EXRS.

From the Superior Court of Fulton County

Upon consideration of the motion to dismiss filed in this case, it is ordered that it be hereby granted.

Exhibit A

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA, September 22, 1988

The motion for a rehearing was denied today:

Case No. 46018, Income Properties, Inc., et al. v. Lunsford, Exr., et al.

Exhibit B

Supreme Court, U.S.
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JOHN C. LUNSFORD, ET AL. -- RESPONDENT

ON WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

RESPONSE TO PETITION

FOR WRIT OF CERTIORARI

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SUPPLEMENTARY LISTING OF PARTIES

The Petition for Writ of Certiorari is filed by "Income Properties, Inc., et al." (Page 1 of Petition). The letter of January 10, 1989 from Glenville Haldi, Esquire, Petitioners' counsel, to Mrs. Loretta S. Ruffin, Assistant Clerk of this Court, states the parties at interest to be: John C. Lunsford, Income Properties, Inc. and Hugh C. Hunter. The Appellants in the Supreme Court of Georgia were Income Properties, Inc., Hugh C. Hunter and Mike E. Hunter. It is believed that Mike E. Hunter may also be a Petitioner in this Court.

The Respondents are named in the caption of the Petition as "John C. Lunsford, et al." In fact, the appellees in the Supreme Court of

Georgia and the Respondents in this Court are John C. Lunsford, Daniel J. Lunsford and William F. Lozier, as Executors of the Estate of Joel Lunsford.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Respondents, John C. Lunsford, Daniel J. Lunsford and William F. Lozier, as Executors of the Estate of Joel Lunsford, herewith make this Response to the Petition for Writ of Certiorari and pray that the same be denied.

CONCISE STATEMENT OF THE CASE

This is a landlord and tenant litigation. A Final Judgment and Decree in favor of Respondents and against Petitioners was entered in the Trial Court (Superior Court of Fulton County, Georgia) on October 19, 1987. On November 25, 1987 (thirty-seven [37] days later) Petitioners filed their Notice of Appeal to the Supreme Court of Georgia.

The Appeal was docketed in the Supreme Court of Georgia on July 19, 1988. On July 22, 1988 Respondents filed in the Supreme Court of Georgia a Motion to Dismiss the Appeal based upon the ground that the Notice of Appeal was not timely filed in the Trial Court. Petitioners filed their Enumerations of Error and Brief in support of their appeal on August 16, 1988, but did not respond to the Motion to Dismiss.

The Supreme Court of Georgia granted the Motion to Dismiss on September 7, 1988, some forty-seven (47) days after the filing of the Motion to Dismiss, and denied Petitioners' Motion for Rehearing on September 22, 1988.

SUMMARY OF ARGUMENT

The Dismissal of Petitioners' Appeal to the Supreme Court of Georgia as being untimely filed was not error. The "Question Presented" by Petitioners is not a matter of Federal Constitutional significance so as to be subject to review under Rule 17 of the Rules of this Court.

ARGUMENT

1.

Dismissal Of The Appeal By The Supreme Court Of Georgia Was Correct.

Under Georgia law a party wishing to appeal from an appealable decision of the Trial Court must do so within thirty (30) days of the entry (filing) of the decision.

"A Notice of Appeal shall be filed within 30 days after entry

of the appealable decision or judgment complained of...." Official Code of Georgia Annotated 5-6-38.

A timely filing of a Notice of Appeal is jurisdictional.

"The proper and timely filing of a Notice of Appeal is an absolute requirement to confer jurisdiction upon the Appellate Court." Jordan vs. Caldwell, 229 Ga. 343, 344 (1972); See also, Blanton vs. Jones, 230 Ga. 866 (1973); and McKinney vs. The State, 187 Ga. App. 702 (1988).

"We hold that the burden is on the party desiring to take the appeal to determine when the judgment is filed in the Trial Court, and the burden is on the party desiring to appeal to file

his Notice of Appeal within the 30-day period or within a duly authorized extension of the 30-day period." Jordan, supra.

Petitioners did not file their Notice of Appeal in the Trial Court within the time required by the statute (30 days) nor did they seek or obtain an extension of time. The dismissal of the appeal was in conformity with the Georgia statute and with judicial precedent.

Rule 39 of the Rules of the Supreme Court of the State of Georgia requires the Brief for the Appellant to be filed within twenty (20) days after the case is docketed unless the time is extended by the Court. In fact, Petitioners requested and obtained an extension of time and were allowed twenty-eight (28) days for filing their Brief. Peti-

tioners' Brief did not refer to the Motion to Dismiss which had been pending for twenty-five (25) days at that time. Neither did Petitioners otherwise respond to the Motion to Dismiss. The Motion was granted and the appeal was dismissed on September 7, 1988, forty-seven (47) days after the Motion was filed. Only then did Petitioners undertake to respond to the Motion to Dismiss by way of a Motion for Rehearing. By failing to respond or object to the Motion to Dismiss in the Supreme Court of Georgia Petitioners waived any right to complain in this Court.

2.

The Question Presented Is Not Of Federal Constitutional Significance.

Petitioners seek review and relief under the Fifth Amendment to the United

States Constitution. The Fifth Amendment is a limitation upon the powers of the Federal Government. It is the Fourteenth Amendment which is a limitation upon the powers of the States. Betts vs. Brady, 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 (overruled on other grounds, Gideon vs. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792).

The guarantee of due process viewed in its procedural aspect requires no particular form of procedure. Mitchell vs. W. T. Grant Co., 416 U.S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895.

The procedure by which rights may be enforced and wrongs remedied is particularly a subject of State regulation and control. Brown vs. Mississippi, 297 U.S. 278, 80 L. Ed. 682, 56 S. Ct. 461.

With respect to the Motion to Dismiss filed in the Supreme Court of Georgia, Petitioners were given notice by service of the Motion upon them pursuant to Rule 43 of the Rules of the Supreme Court of the State of Georgia. They were given an opportunity to be heard prior to a ruling upon the Motion but elected to remain silent. Notice and an opportunity to be heard are the basic requirements of procedural due process. Mullane vs. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652.

Respondents' Motion to Dismiss sat unopposed for forty-seven (47) days before it was granted. Nothing about the dismissal of the appeal by the Supreme Court of Georgia is offensive to fundamental principals of liberty and justice. Re: Groban, 352 U.S. 330,

1 L. Ed. 2d 376, 77 S. Ct. 510.

Assuming that Petitioners have a legally arguable issue, such issue is not within those matters which this Court reviews by Writ of Certiorari pursuant to Rule 17.

CONCLUSION

Petitioners were dilatory in filing their original Notice of Appeal. They allowed the Motion to Dismiss filed in the Supreme Court of Georgia to go unopposed. The dismissal of the appeal by the Supreme Court of Georgia was an eminently correct decision. This Court should not grant the Petition for Writ of Certiorari.

Respectfully submitted,

Tom Pye
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CERTIFICATE OF SERVICE

This is to certify that I have this date served counsel for the opposing parties with three (3) copies of the within and foregoing Response to Petition for Writ of Certiorari by depositing same into the United States Mail, with adequate first class postage thereon, and addressed as follows:

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This 19 day of January, 1989.

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